

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

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|-------------------------------|---|---------------------|
| MEL FINERMAN CO. /CIRCLE TWO, |) | |
| |) | |
| Employer, |) | Case Nos. 78-RC-1-V |
| |) | 78-RC-1-E |
| and |) | |
| |) | |
| UNITED FARM WORKERS |) | |
| OF AMERICA, AFL-CIO, |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| and |) | |
| |) | |
| INTERNATIONAL UNION OF |) | |
| AGRICULTURAL WORKERS, |) | |
| |) | |
| Intervenor. |) | |

DECISION AND
CERTIFICATION OF REPRESENTATIVE

Following a petition for certification filed by the United Farm Workers of America, AFL-CIO (UFW), on February 3, 1978, and a petition for intervention filed by the International Union of Agricultural Workers (IUAW), on February 8, 1978, a representation election was conducted on February 10, 1978, among the agricultural employees of Mel Finerman Co., Inc.(Finerman) and Circle Two. The combined tally of ballots showed the following results:

| | |
|--------------------------|-----------|
| UFW | 117 |
| IUAW | 30 |
| No Union | 29 |
| Challenged Ballots | <u>30</u> |
| Total | 206 |

In addition to the combined tally, separate tallies were prepared for the agricultural employees of Circle Two and Finerman. The separate tally of the ballots cast by employees of Circle Two showed the following results:

| | |
|--------------------------|-----------|
| UFW | 93 |
| IUAW | 2 |
| No Union | 6 |
| Challenged Ballots | <u>20</u> |
| Total | 121 |

The separate tally of the ballots cast by employees of Finerman showed the following results:

| | |
|--------------------------|-----------|
| UFW | 24 |
| IUAW | 28 |
| No Union | 23 |
| Challenged Ballots | <u>10</u> |
| Total | 85 |

Circle Two, Finerman and the UFW each timely filed post-election objections, four of which were set for hearing. Subsequent to the hearing, Investigative Hearing Examiner (IHE) Newman Strawbridge issued the attached Decision, in which he recommended that the objections be dismissed and that the UFW be certified as exclusive collective bargaining representative of the unit employees. Thereafter, Finerman and the UFW each timely filed exceptions to the IHE's Decision and a brief in support of exceptions.

Pursuant to the provisions of Labor Code Section 1146, the Agricultural Labor Relations Board has delegated

its authority in this matter to a three-member panel.

The Board has considered the objections, the record, and the IHE's Decision in light of the exceptions and briefs, and has decided to affirm the rulings, findings, and conclusions of the IHE, and to adopt his recommendations to dismiss the objections and to certify the UFW.

We agree with the IHE that Circle Two is not an agricultural employer within the meaning of Labor Code Section 1140.4(c). Although Circle Two may exercise somewhat more authority than a typical labor contractor in its harvesting of crops owned by Finerman,^{1/} we find that Finerman retained a more substantial and permanent interest in the ongoing agricultural operation. See Joe Maggio, Inc., 5 ALRB No. 26 (1979). We therefore conclude that Finerman is the agricultural employer of Circle Two's agricultural employees and that the said employees are part of the appropriate bargaining unit herein.

Factors which we consider significant in making this determination include the following. The principals in Circle Two formerly worked for Finerman and their duties have not substantially changed. Substantially more than 90 percent of Circle Two's work is performed for Finerman. All major equipment is supplied by Finerman, so long as available.^{2/} Circle

^{1/} In two years of operation, Circle Two has performed only three spot jobs for employers other than Finerman, and on two of those occasions it used Finerman Equipment.

^{2/} We do not consider Circle Two to have supplied specialized equipment as the equipment was leased from Finerman and paid for by a setoff from the harvesting fee.

Two's potential profits and losses are greatly affected and limited by Finerman's control of the entire agricultural operation, of which Circle Two's activities are an integral part.

The objections filed by the Employer and the UFW are hereby dismissed, the election is upheld and certification is granted to the UFW.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid votes have been cast for the United Farm Workers of America, AFL-CIO, and that, pursuant to Labor Code Section 1156, said labor organization is the exclusive representative of all agricultural employees of Mel Finerman Co., Inc., in the State of California, for the purpose of collective bargaining, as defined in Labor Code Section 1155.2(a), concerning employees' wages, working hours, and other terms and conditions of employment.

Dated: April 18, 1979

GERALD A. BROWN, Chairman

RONALD L. RUIZ, Member

JOHN P. MCCARTHY, Member

CASE SUMMARY

Mel Finerman Co./Circle Two
(UFW)

Case Nos. 78-RC-1-V
78-RC-1-E
5 ALRB No. 28

IHE DECISION

In a representation election conducted among the employees of both Mel Finerman Co. and Circle Two, in which the UFW received a majority of the votes cast, a hearing was held on three of the Employer's objections: (1) that Finerman and Circle Two are separate employers, and that Circle Two operates as a custom harvester; (2) that Finerman and Circle Two are not joint employers; and (3) that even if the two entities are held to constitute a single employer, Circle Two's employees should be placed in a separate bargaining unit. In addition, the hearing included one UFW objection, which the UFW asked withdrawn if the Board found one combined unit to be appropriate: that Finerman did not supply an employee list for the Oxnard area until the day of the preelection conference, and that the list belatedly provided was inaccurate.

The IHE found that Finerman is the agricultural employer of all of the employees in question. He based this conclusion on the following factors: (1) Circle Two does not have a long-term interest in agricultural production; (2) Circle Two is economically dependent on Finerman; and (3) Finerman has actual control over the means and methods of production. The IHE also found that a statewide bargaining unit is appropriate. As to the UFW's objection, the IHE found that the employee list provided by Finerman was inadequate.

BOARD DECISION

The Board affirmed the IHE's Decision and recommendations to overrule Finerman's objections and to certify the union. The Board noted that while Circle Two may exercise somewhat more authority than a typical labor contractor in harvesting Finerman's crops, Finerman retained a more substantial and permanent interest in the agricultural operations. The Board considered the following factors significant: the principals in Circle Two were former officials of Finerman, performing the same work; more than 90 percent of Circle Two's work is performed for Finerman; most of the major equipment is supplied by Finerman; and Circle Two's potential for profits and losses is greatly limited and affected by Finerman's control of the agricultural operation.

Objections dismissed. Election upheld. UFW certified as exclusive collective bargaining representative.

* * *

This case summary is furnished for information only and is not an official statement of the case, or of the ALRB.

STATE OF CALIFORNIA
AGRICULTURAL LABOR RELATIONS BOARD

In the Matter of:

MEL FINERMAN CO./CIRCLE TWO,
Employer,

Case Nos. 78-RC-1-V
78-RC-1-E

and

UNITED FARM WORKERS OF AMERICA,
AFL-CIO,

Petitioner,

and

INTERNATIONAL UNION OF
AGRICULTURAL WORKERS,

Intervenor.

Rob Roy, for Mel Finerman.

Rich Andrade, of Dressler, Stoll &
Jacobs, for Circle Two.

Tom Dalzell, for the United Farm
Workers of America, AFL-CIO.

DECISION

Following a Petition for Certification filed by the United Farm Workers of America, AFL-CIO, (hereafter "UFW") and a Petition for Intervention filed by the International Union of Agricultural Workers (hereafter "IUAW"), an election was conducted on February 10, 1978 among the agricultural workers of the Mel Finerman Co., Inc., and Circle, Two, Inc.

Separate tallies were prepared for the workers of Circle Two and Finerman, as well as a combined tally for the workers of both companies.

The results of the election among Circle Two's workers were as follows:

| | |
|------------|----|
| UFW | 93 |
| IUAW | 2 |
| No Union | 6 |
| Challenges | 20 |

The results of the election among Finerman workers were as follows:

| | |
|------------|----|
| UFW | 24 |
| IUAW | 28 |
| No Union | 23 |
| Challenges | 10 |

The combined result was as follows:

| | |
|------------|-----|
| UFW | 117 |
| IUAW | 30 |
| No Union | 29 |
| Challenges | 30 |

Circle Two, Finerman, and the UFW all filed timely objections to the election. By notice dated April 6, 1978 three of the employer's objections and one of the UFW's were set for hearing. A hearing on these objections was held before me on May 23, 1978 in Oxnard, California. Evidence was taken on all three employer objections and the single UFW objection. The IUAW did not make an appearance or participate in the hearing.

The objections upon which evidence was taken are as follows:

1. The unit description in the Petition for Certification is incorrect in that Mel Finerman Co., Inc., and Circle Two are separate employers with Circle Two operating as a

custom harvester.

2. The Board improperly determined the employer status of Circle Two by holding that Circle Two and Mel Finerman are joint employers.

3. The employees of Circle Two should be considered in a bargaining unit separate and apart from the employees of Mel Finerman Co., Inc., if it is determined that the two companies are a single employer.

4. The pre-election employee list for the Oxnard area was not supplied by the Mel Finerman Co., Inc., until the day of the pre-election conference and was so inaccurate as to require setting aside the election.

I
JURISDICTION

No party contests the fact that Mel Finerman Co., Inc., is an agricultural employer within the meaning of Cal. Lab. Code §1140.4(c) and I so find. It is the position of Mel Finerman and Circle Two that Circle Two is also an agricultural employer within the meaning of Cal. Lab. Code §1140.4 (c), while it is the position of the UFW that Circle Two is a farm labor contractor excluded from the statutory definition of agricultural employer. Jurisdiction over Circle Two, therefore, will be established only if I find that the company is a separate employer (or as the UFW argues: a joint employer) within the meaning of the Act. Since this point is at issue, I will not make a finding here.

No party disputes the fact that the UFW is a labor organization within the meaning of Cal. Lab. Code §1140.4 (f) and I so find.

II

THE STATUS OF CIRCLE TWO

A. Uncontradicted Facts and Findings

1. History of Circle Two

Circle Two is a California partnership wholly and equally owned by Harvey Cohn, Inc., and Ken Yoshioka, Inc. Harvey Cohn, Inc., is owned by Mr. Harvey Cohn. Ken Yoshioka, Inc., is owned by Mr. Ken Yoshioka. The families of the owners are the officers of the corporations.

From 1969 to 1976 Mr. Harvey M. Cohn was Vice-President in charge of harvesting for Mel Finerman, Inc. According to Mr. Cohn, his duties while working for Mel Finerman were basically the same as they are now as owner and manager of Circle Two. Mr. Ken Yoshioka was for the two years before Circle Two was formed a supervisor in Mel Finerman's harvesting department. Two out of three of the full time supervisors for Circle Two were Mel Finerman employees before the formation of Circle Two. Out of six foremen since the beginning of Circle Two three served Finerman in the same capacity. Mr. Cohn has from the beginning "negotiated" with and reported to Mr. Jerry Goldstein, the senior Vice President of Mel Finerman, Inc., and the same man Mr. Cohn reported to while working as an employee of Finerman's.

Mr. Cohn's testimony indicates that the transition from harvesting department to independent harvester took place with no disruption to the Finerman production process since Circle Two harvested the Finerman lettuce crop the first year it was formed in 1976.

2. "Over-All Activity"

Responsibility for the pre-harvest work on Finerman lettuce - that is, the planting, seed selection, tractor work, irrigation, water, weeding and thinning is divided between Finerman and/or the grower involved. Circle Two then harvests and transports the lettuce to the cooler or point of loading. Finerman is responsible for cooling, marketing and shipping the lettuce.

3. Other Clients

Work for Mel Finerman accounts for well over 90 percent of Circle Two's business. Since its formation Circle Two has done only three spot jobs for other clients, on each occasion providing two or three crews for two or three days.

4. How Services are Rendered: Means

a. Capital Equipment

Mel Finerman, Inc., provides almost a half million dollars worth of equipment on credit through oral contracts. Circle Two owns almost none of the equipment necessary for the harvest of lettuce and which is in fact used to harvest lettuce. The following equipment is, according to Mr. Cohn, necessary for the harvest of lettuce in California. A stitcher truck, which when relatively new and in good repair costs around \$30,000, is required per crew. Circle Two usually uses six or seven stitcher trucks. Mel finerman provides these trucks pursuant to an oral contract which provides that a per carton fee will be deducted from the money due Circle Two for the

harvesting once it is done. So around \$140,000 worth of stitcher equipment is thus provided and controlled by Finerman. Circle Two usually requires about 17 haul trucks which cost an estimated \$40,000 new and which Finerman provides through the same credit system. Finerman provides wrap machines when needed free or as a part of the general fee for the other machines. Finerman also provides free of charge (or as part of the rental fee for the other machinery) the use of buses for transporting workers. The lettuce boxes are also provided by Finerman.

Circle Two owns one pick-up at an estimated value of \$5,000 to \$6,000, and rents one other pick-up. The partnership owns two cars (of unstated value) which the partners drive. Circle Two owns an estimated \$2,675 worth of staple guns (six or seven per crew for six or seven crews at \$75.00 each) as well as 49 closing frames at a value of \$22 each for \$1,078. It owns the gloves used by the workers and the staples and wire used for packing.

When Finerman machinery is in disrepair or the harvest is such that more machinery is needed than Finerman has, Circle Two rents from other sources. The terms are basically the same as those with Finerman, though in some cases these contracts are written. The percent of production obtained through the utilization of equipment from other than Finerman sources is about 20 percent. This amounts to about 600,000 cartons out of 3.3 or 3.4 million. The full utilization of Finerman equipment has always been and remains a condition to the Circle Two/Finerman harvesting agreement.

b. Operational Cost

The main office of Circle Two is the residence of Mr. Cohn in Pacific Grove, California. Circle Two also maintains

temporary offices in whatever area they are working. Circle Two bears the burden of maintaining insurance for the rented equipment, as well as the cost of maintaining the equipment in working order. Circle Two provides the fuel for all trucks rented from Finerman and purchases the wire and staples necessary for packing. Circle Two shoulders the cost of compliance with federal regulations such as OSHA and Social Security as well as monies necessary for compliance with State Health Regulations. Circle Two pays for administrative and professional services such as a secretary, a CPA, a lawyer and a tax accountant.

5. How Services are Rendered; Methods

a. Labor Agreements; Terms and Conditions of Employment Circle Two employed 3,200 workers last year. These workers are, according to Mr. Conn, covered by a collective bargaining contract negotiated by him in Phoenix, Arizona, in early 1977. Again, according to Mr. Cohn, the field workers are covered by Local 274 of the Western Conference of Teamsters and the truck drivers under Local 890, WCT. Dues, health and pension fund payments are made to the nearest Teamster Local in all areas of California worked by Circle Two. Circle Two testified that the only petition it has ever been served with is the one in this case. Therefore, the agreement did not come about pursuant to the requirements of the ALRA. ^{1/}

^{1/} California Labor Code §1159 states that, "In order to assure the full freedom of association, self-organization and designation of representatives of the employees' own choosing, only labor organizations certified pursuant to this part shall be parties to a legally valid collective bargaining contract." See Cal. Lab. Code §1153 (f) which makes it an unfair labor practice "to recognize, bargain with, or sign a collective bargaining agreement with any labor organization not certified pursuant to the provisions of this part." See also Cal Lab. Coda §1156 which requires that exclusive representatives be chosen by secret ballot.

Mel Finerman has a collective bargaining contract with Teamsters Local 274 for its field workers, Local 186 for its packing shed workers in Oxnard, Local P-78-B for its vacuum cooler workers and Teamster Local 890 for its truck drivers. Except for wage differentials for different crops, the contracts with Mel Finerman contain the same provisions as are found in the contracts held by Circle Two. The Finerman contract covers employees of labor contractors hired by Finerman.

b. Discretion and Judgment

Circle Two testifies that it determine which fields will be harvested, the number of boxes to be harvested that day and the number of workers to be employed each day. However, I must note that since the demand for lettuce is relatively constant, price is determined by supply. This means that it is the readiness of the crop (controlled by Finerman through irrigation schedules and plant selection), the demands and manipulations of the market (interpreted by Finerman) and the labor requirement of the technology used in production (also controlled by Finerman) which actually set the level of labor required and supplied. I also note that these factors, as opposed to the discretion of the harvester are determinative of the level of production in terms of the number of boxes.

Circle Two has the power to hire, fire, and supervise its workforce.

I conclude from the testimony of Mr. Cohn that the key judgment provided is the determination of when a particular field

is ready for harvest. Mr. Cohn testified that the day to day consultation between Circle Two and Mel Finerman is in the nature of a report to the marketing division concerning when harvest can start, the quality of the crop, and how many boxes are likely to be coming in on a daily basis.

6. Fee Arrangement; Risk of Loss

Prior to harvest Circle Two negotiates a flat fee for a harvest-to-shed service. Circle Two is paid on a per unit basis. Most of Circle Two's cost accrues on a per unit basis and is fixed by the terms of the contract. Since the dominate cost—that of labor and capital equipment—are actually levied on a per box basis after production and since the other cost are in terms of one season, constant or can be known with some degree of certainty, the risk of loss from cost is found only in changes in the cost of wire, gas, and staples in the course of one harvest.

The only other real risk of loss assumed by Circle Two is in the fact that Circle Two takes responsibility for any damage to the crop from the time it is harvested until it arrives at the vacuum cooling facility.

7. Fee Arrangement; Production of Profit

As indicated, the majority of Circle Two's cost is fixed and determinable on a per unit of production basis such that the cost does not accrue except in association with an already credited fixed gain previously determined by the terms of the contract. In this circumstance, the productivity of labor is the fundamental source from which Circle Two could increase profit.

8. Investment/Ownership

Circle Two was created by an investment of an unspecified amount of personal savings of Mr. Yoshioka and Mr. Cohn. They have invested in no agricultural land, crops or machinery excepting a relatively small investment in staple guns, closing frames, and gloves. They own one truck, two cars and rent everything else on credit from Finerman or other renters if Finerman has no available equipment. They invest some money in operational cost such as fuel, compliance with federal and state regulations, and administrative and professional services, but the fundamental investment in the cost of production is provided by Finerman in the form of advancing the rental cost of capital equipment.

B. Analysis, Conclusions and Recommendations on the Employer Issue

The Act should be interpreted in such a manner that it encourages and protects the rights of farm workers to organize and bargain collectively with their employer. (Gourmet Harvesting, 4 ALRB No. 14 (1978).) Real bargaining can only occur when organized workers talk directly with the men and/or women who, in economic reality exert control over the means and methods of production. (Napa Valley Vineyards, 3 ALRB No. 22 (1977); A. Paladini, Inc., 168 NLRB No. 132). The ALRB has been clear that it intends to fasten "the bargaining obligation upon the entity with the more permanent interest in the ongoing agricultural operation" (Gourmet Harvesting, 4 ALRB No. 14 (1978) at 5).

Labor organizations under the ALRA can not bargain with labor contractors (Cal. Lab. Code §1140.4(c), Cardinal Distributing Co., 3 ALRB No. 23 (1977)) since to do so would simply be to bargain with a middleperson unable to make real economic decisions thereby causing instability in labor relations resulting in disruption of production and violence.

On the other hand, when an entity performs functions beyond the supplying of labor for a fee to such an extent that it assumes the primary employer relationship to the employees, the Board has held that a labor contractor can also be an employer. The factors that are considered when determining whether an entity which is licensed as a labor contractor is nonetheless a statutory employer are "indicia of that more permanent interest (which) provides a basis for a more stable bargaining relationship." (Gourmet Harvesting, 4 ALRB No. 14 (1978) at 5.)

There are, therefore, two questions. One, is Circle Two a labor contractor? If so, it is excluded from the definition of employer and its workers must look to Mel Finerman for the purposes of bargaining. And two, if Circle Two is not a labor contractor, is it a separate employer for the purposes of bargaining?

Is Circle Two a labor contractor? Labor contractor has traditionally referred to someone who supplied labor for a fixed fee per worker per hour. (Kotchever Brothers, 2 ALRB No. 45 (1976).) Circle Two provides harvest-to-shed services. This includes the provision and maintenance of the capital equipment, operation and

administrative cost. It assumes the responsibility of transporting the commodity. To a limited degree they also determine who is to work, where, when, and how this work is to be done. All this is over and above the simple provision of labor for a fee. Because I read the exclusionary aspect of Cal. Lab. Code §1140.4 (c) to refer to the traditional definition of labor contractor which Circle Two exceeds, I find that Circle Two is not a "labor contractor" for the purposes of this provision. ^{2/}

Then if Circle Two is not a labor contractor, is it a separate employer for the purposes of bargaining?

Factors in determining the kind of interest necessary to be a separate employer are as various as the patterns of ownership and control and no one factor is dispositive. The decisions are made on a case-by-case basis. The bargaining obligation should attach to the entity which in economic reality has an independent and long term interest in agricultural production and

^{2/} I should note that since Cardinal Distributing Co., 3 ALRB No. 23 (1977), a labor contractor can have full authority over the immediate working conditions, that is to hire, fire and direct employees, he or she may assume some "pack-out" type risk and he or she may pay operational expenses as well as provide some of the equipment necessary for rendering the services involved. To the degree this is true it is no longer true that a labor contractor is one who makes profit solely off the actual (and exclusively) manual labor of workers provided by him or her. Under this expanded definition Circle Two could be characterized as a labor contractor. However, even though a contractor can retain management prerogative, provide some capital investment and assume some risk of loss in production, the major factor still seems to be what the entity actually does (Napa Valley Vineyards, 3 ALRB No. 22 (1977)) and whether it is more than supplying labor. (Gourmet Harvesting, 4 ALRB No. 14 (1978).) Additionally, the same purposes--integrity of bargaining--can be achieved with less historical, distortion and fewer analytical problems through a separate employer analysis. (William Riggan and Son, Inc., 153 NLRB No. 107; A. Paladini Inc, 168 "NLRB No. 132).

who actually controls the means and methods of production within the unit. ^{3/}

1. Long Term Interest in Agricultural Production

Does Circle Two show enough long term interest in agricultural production such that fastening the bargaining obligation on them serves the purpose of stability?

Prior to 1976, what is now Circle Two was the lettuce harvesting department of Mel Finerman. Circle Two has invested in no agricultural land or crops. Circle Two has invested in no agricultural equipment except a relatively small investment in staples, staple guns, closing frames and gloves. Circle Two does invest in operational cost but these resources are expended upon production and are not aspects of long term interest. Circle Two has no substantial or ongoing economic relationship with anyone in agriculture other than Mel Finerman. It is my conclusion that Circle Two does not, as presently constituted, show any objective evidence of a long term interest in agricultural production.

2. Economic Independence

Is Circle Two sufficiently separate to constitute an

^{3/} Historically, control of the immediate working conditions has held primary sway in this type of analysis. (Albert Lea Cooperative Creamery Association, 119 NLRB No. 817). This, however, has been tempered with what has been called the economic realities test, which seems to go more to the control of capital and equity than the immediate environment of the worker. (A. Paladini, Inc., 168 NLRB No. 132; William P. Riggins and Son, Inc., 158 NLRB No. 107). Each test tries to identify that degree of control necessary to facilitate bargaining between the actual parties in interest. The ALRB has found apposite the reasoning and guidelines of 29 CFR Sections 780.330 and 730.331 used to determine whether share-croppers and tenant farmers are independent contractors or employees. (Napa Valley Vineyards, 3 ALRB No. 22 (1977).) These sections merge the "economic realities and the right of control tests.

independent entity which must respond to the economic forces at play in all bargaining relationships? Or stated otherwise, is Circle Two so dependent on Mel Finerman that it is really the economics of the Finerman operation that defines with too much certainty the bargaining options of Circle Two?

a. Over-all Production Process

Circle Two harvests and transports lettuce already grown by Finerman to the cooler which is owned by Finerman. Finerman is responsible for cooling, marketing and shipping the lettuce. Circle Two's services are therefore an integral part of an overall production process controlled and owned by Mel Finerman.

b. Economic Dependency

Circle Two is economically dependent on Finerman in two ways. Over ninety percent (90%) of Circle Two's income is derived from oral, terminable-at-will contracts, with Mel Finerman. Secondly, without Finerman advancing the cost of capital equipment necessary for harvesting and the accounting delay effected by the piece rate payment of labor cost, Circle Two would not be capable of servicing its contract. The authority and strength of any negotiating position taken by Circle Two would invariably depend upon the value placed by Mel Finerman upon the services rendered by Circle Two. The relative economic strength of Mel Finerman and the dependent character of Circle Two's relationship to Finerman, produce a milieu in which everything Circle Two does is keyed to insuring that Mel Finerman continues to utilize the services of Circle Two. (MLT, Inc., 223 NLRB No. 157; A. Paladini, 169 NLRB No. 132).

c. Risk Capital

Since the fundamental cost of production is advanced and Circle Two shows no ownership interest in either agricultural crops, land or the machines necessary to harvest lettuce, I conclude that Circle Two has not and does not risk any significant amount of capital.

d. Production of Profit

Since Circle Two, if it is to harvest Finerman lettuce, must use Finerman machinery, its only method of increasing profit is by increasing the productivity of labor. This characteristic is usually important in determining whether an entity is a separate employer for the purposes of bargaining. However, the scope of the manipulations available to Circle Two are severely limited by production demands which are controlled by growing schedules, crop readiness and Finerman controlled marketing abilities and plans. I conclude that Circle Two has a narrow scope within which it can produce profit by manipulation of labor but that this characteristic on balance does not mitigate the otherwise controlling influence Mel Finerman has in this picture.

e. Risk of Loss

The cost of, and return from, production are fixed and accrue simultaneously. Therefore, the only risk assumed by Circle Two is in the quality of a pack for which a worker has been paid but which is rejected by Finerman. There was no evidence produced that this risk ever materialized in loss.

3. Actual Control Over the Means and Methods of Production

Does Circle Two show enough control over the means and methods of production such that they could respond to demands

which eventually emerge from the bargaining relationship?

a. Discretion and Judgment

Within its limited area of responsibility, Circle Two exercises apparent discretion and judgment. Circle Two's personnel determine which fields are to be harvested on which days, the number of boxes that can be harvested each day, and the number of workers to be employed each day. However, as indicated earlier, lettuce is a commodity which is harvested pursuant to a demand market. This means it is the readiness of the crop, and the decisions of the marketing department which actually dictate what fields are to be harvested, the amount of daily harvest and the number of workers needed on any certain day. Given the contractual proscription on what capital equipment can be used in the harvest, the only real decision to be made is when one field is ready for harvest, as compared to any other field in the same area. Except for the determination of when lettuce is ready, which is not fundamentally different from the type of judgment exercised by skilled workers doing complicated task in all areas of production, Circle Two actually has very little opportunity to apply the type of discretion and judgment generally characterized as entrepreneurial.

b. Hiring, Firing and Supervision

Circle Two controls the hiring, firing and supervision of the labor force it employs albeit each function is somewhat superficial since the particular task to be performed, the method and rate of doing it are to a large degree controlled by external forces already discussed.

c. Control of Necessary Equipment (Machinery)

Mel Finerman owns 80 percent of the capital equipment utilized by Circle Two for the harvest of lettuce. In order to do the Finerman harvest, Circle Two must by the terms of their agreement use Finerman equipment, when available. Finerman provides the equipment on credit. Therefore, in actual economic facts Finerman controls the machinery necessary for Circle Two to operate. ^{4/}

CONCLUSION AND RECOMMENDATION

Circle Two shows very little long term interest in agricultural production. It is totally dependent on the economics of the Finerman operations and the entrepreneurial decisions made by Finerman's management. Circle Two controls almost none of the means of production and has little or no control over the methods. For these reasons the basic policy of stabilizing the productive forces dictates that "employees" of Circle Two should bargain with the management of Mel Finerman. Consistent with the judicial dictate that social legislation be construed "in light of the mischief to be corrected and the end to be attained," Circle Two is for the purposes of bargaining, simply a harvesting

^{4/} Circle Two argues that it is the simple ability to provide the machinery necessary for production which is the key to the Board's decisions on the issue. Given the language of Gourmet, that the Board is looking for the entity with the more permanent interest, where there is a distinction between control and the ability to provide, the entity that controls the machinery is the more appropriate entity, assuming other factors are not contrary, for the purposes of bargaining.

agent employed and controlled by Mel Finerman and Company. ^{5/}

I recommend the Board certify Mel Finerman the "employer" for the purposes of collective bargaining.

III. APPROPRIATE UNIT

If the employer's operation is non-contiguous the Board has discretion to determine the appropriate size of the unit. "No formula for unit appropriateness is possible. No single criterion is determinative and what may be determinative in one circumstance may not be determinative in another." Bruce Church, 2 ALRB No. 38 (1976). Factors utilized by the NLRB and adopted by the ALRB include: 1) The physical or geographical location of the operations in relation to each other; 2) The extent to which administration is centralized; 3) The extent to which employees at different locations share common supervision; 4) The extent of interchange among employees from location to location; 5) The nature of the work performed at the various locations and the similarity or dissimilarity of the skills involved; 6) Similarity in wages, working hours, and other terms

^{5/} The Regional Director determined that for the purposes of the election Circle Two and Mel Finerman were joint employers. Both Circle Two and Mel Finerman object to this categorization and the UFW argues it only if Circle Two is found to be an employer under §1140.4. I have made no such finding and therefore do not reach the question. The term joint employer implies a mutuality of control such that one is necessary to the functioning of the other and neither are subject to termination by the other. Here, there is no common ownership. Control is not mutual. Circle Two is in economic reality dependent upon Mel Finerman. There is no common management. The operations are not similar, and they are interrelated only in the sense that one controls the other and that one is integral to (but replaceable by) the other. The labor relations are similar, legally merged, ostensibly separate but in fact controlled by the dictates of the industry, in the context of a harvesting contract within a demand market.

and conditions of employment; and 7) The pattern of bargaining history among employees. Bruce Church, 2 ALRB No. 38 (1976). I shall proceed to examine these factors in relation to the operations of the employer.

1. Geographical Location

Mel Finerman has agricultural operations in five areas in California: The Imperial Valley, Oxnard, Santa Maria, Los Alamos, Firebaugh, and Salinas. Mel Finerman also has agricultural operations in Arizona (Yuma, Central Arizona, Wilcox), New Mexico, and Colorado.

2. Centralization of Administration

Mel Finerman's main corporate office is in Salinas, California. Finerman's marketing and sales operations are handled out of this office, with some assistance provided by the permanent field office in Oxnard for the sales of celery and cabbage. Sales categories are not determined by geographical origin of the commodity but rather the quality of the product. Finerman and his harvester open temporary offices in the areas in which the lettuce harvest is being conducted.

Decision making in Mel Finerman is centralized. The company's management staff determines the number of acres to be devoted to individual crops in all areas, makes all major decisions regarding procurement, land leases, harvesting, and marketing; enters into state wide insurance contracts; and maintains accounting, payroll, and record keeping for the individual areas. (Employer's (M-F) Post-Hearing Brief, page 7.)

3. Interchange of Supervisors

The harvesting agent, his three harvesting supervisors, as well as the three steady crew foremen all travel from one Finerman operation to the other throughout the State of California, The supervision of the celery and cabbage crews which work solely in the Oxnard areas is different than the supervision of the lettuce harvest.

4. Interchange of Employees

The crew bosses in Finerman's lettuce operation travel from area to area. The harvesting agent testified that these crew bosses usually have their own following. Mr. Cohn testified that whether a worker goes from one area to another is determined by the amount of work to be done and the timing of the harvest. A worker will go to the next Finerman harvest if it is likely to last long enough to pay him or her to travel to the next location, given the time he or she finished harvest work in one area. There is no interchange between the lettuce and cabbage/celery crews. The celery and cabbage crews stay in one place and only work on the harvest of celery and cabbage.

5. Interchange of Equipment

The equipment used in the harvest of lettuce is moved to all five areas. The equipment used for the harvest of celery and cabbage is not interchanged with the equipment moving around the state harvesting lettuce. All the capital equipment for both operations is owned by Finerman. Circle Two owns some of the equipment used in the harvest of lettuce. This equipment is more

in the nature of supplies such as staples, wire, etc. which also travels from lettuce harvest to lettuce harvest.

6. Nature of the Work Performed and Skills Involved

The nature of lettuce cutting is the same in all areas of California. The nature of the cabbage operation is very similar to that of the lettuce operations with the major difference being that a lesser degree of care is required in packing cabbage. Celery is also distinguished in that it is a non-field pack operation.

7. Wages and Working Conditions

The wages and working conditions for Finerman/Circle Two employees are ostensibly controlled by two contracts. The wages are different for the different crops but the working conditions are identical (Compare Mel Finerman and Circle Two Collective Bargaining Contracts.)

8. Bargaining History

The employees of the harvesting agent, Circle Two, have no previous history of bargaining prior to 1976, as employees of Circle Two. Since 1976, all employees of Circle Two have been in the same unit, irregardless of which geographic location they worked in. Before 1976, the lettuce harvest workers had a bargaining history as Finerman employees with the Teamsters. At that time the contract with the Teamsters covered all the employees of Finerman and did not differentiate between the celery/cabbage workers and those harvesting lettuce.

ANALYSIS

Finerman grows or owns lettuce in five areas of California. Finerman hires a harvesting agent to harvest this commodity in all five areas. The employees of the agent are, for the purpose of bargaining, employees of Finerman. Management

decisions with regard to lettuce, as well as all other crops, are centralized. There is a complete interchange of supervision and equipment in lettuce as well as some degree of employee interchange. The wages and working conditions of the lettuce workers are the same in all five areas. The character of the work and the skills necessary to harvest lettuce are the same in all five areas. There is some evidence that the lettuce workers have a common bargaining history.

Since celery and cabbage are grown exclusively in the Oxnard area there is no interchange of supervision, labor or equipment with the roving lettuce harvesting operation. Management decisions regarding the production of these commodities are centralized in the same management and at the same place as those made with reference to lettuce and described above. The nature of the work is different but the skills necessary are similar to that of a lettuce harvester and the working conditions are the same.

There is no indication that the lettuce operations in Oxnard are carried on in non-contiguous areas from that of the celery/cabbage operations. There is therefore no basis for Board discretion concerning scope of the unit for Oxnard area workers. The unit must always include all agricultural workers employed by the employer and working in contiguous areas or in the same production area. Hence, the only question remaining is the inclusion of the rest of the lettuce operations. As indicated above the lettuce operations are the same in all areas and therefore should be in the same unit.

RECOMMENDATION

I recommend the Board certify one statewide unit.

IV.

EXCELSIOR LIST

The UFW objected that the pre-election list for the Oxnard area was not supplied by Mel Finerman and Company until the day of the pre-election conference and was so inaccurate as to require setting aside the election. The UFW filed this objection on the condition that the appropriate unit was found to be something other than statewide. I have recommended a statewide unit but will review this objection in case the Board does not choose to follow my recommendation.

On Friday, February 3, 1978, a Petition for Certification was filed with the ALRB. At or around 4:40 p.m. an agent of the ALRB called the attorney for Mel Finerman and informed him that such a petition had been filed and that Mel Finerman had until 4:00 p.m. on Monday, February 6, 1978 to deliver to the ALRB a list containing names, addresses and job classifications for all the agricultural employees of Mel Finerman, excluding the workers in the packing shed. Mr. Roy, the attorney for Mel Finerman, states in his declaration that he informed Mr. Smith, the ALRB agent, that the petition was incorrect since it was his view that Mel Finerman and Circle Two were not the same company and that "based upon that error, the company would not comply with supplying the list unless the Regional Director made a proper determination of the companies involved and the scope of the geographical units" (Mr. Roy's declaration submitted

as Employer's Exhibit Q). The Regional Director, Mr. Marc Roberts, then called Mr. Roy and indicated that if Mel Finerman refused to comply with the list requirement he would be forced to invoke the statutory presumptions of §20310 of the California Administration Code. Mr. Roy indicated that Mel Finerman would comply. At 5:45 the petition was given to the Shipping and receiving Clerk at Mel Finerman's in Oxnard. The server asked who was in charge and was told by a man named Rudy that he, Rudy, was in charge. The shed supervising foreman, Mr. Joe Lamanto, stated that neither Rudy nor himself had the authority to accept any papers from anyone. The papers were placed on the top of the first-aid kit in the Shed Foreman's Office. Mr. Lamanto then ordered Rudy to throw the papers in the waste paper basket. (Declaration of Mr. Joe Lamanto, shed supervising foreman for Mel Finerman, submitted as Employer's Exhibit Q.)

On Monday, February 6, 1978, Mel Finerman submitted a list to the ALRB. This list contained no addresses and no job classifications for the 122 names listed thereof. (UFW's Exhibit No. L.) Mr. Marshall Davis, Vice President for Mel Finerman, testified that no addresses were provided on the February 6 list because "there had not been enough time to prepare a list." Two days later, on the day of the pre-election conference and two days before the election, a second list, described by Mr. Davis in testimony as "the best we had" was provided. This list contained four names with no addresses, one name with only a post office box, and 16 names with no local addresses. This second list left 17 percent of the workforce unreachable. (UFW

Exhibit No. 2.) The tally for the Oxnard vote was close with 28 workers voting for the International Agricultural Workers Union and 24 workers voting for the UFW.

LEGAL ANALYSIS

It is the employer's obligation to supply an accurate and up-to-date list of names, addresses, and job classifications of the employer's employees. (8 Cal. Admin. Code §20319(a)(2).) The burden of explaining defects or discrepancies in the list is consequently upon the employer. (Yoder Brothers, Inc., 2 ALRB No. 4 (1976).)

The employer argues that it was not adequately served until Monday morning and therefore the duty to supply the list did not arise until Wednesday, February 8. I find that the employer had actual and sufficient notice via the telephone call the employer's representative on Friday, February 3, as well as the physical service to the employer's place of business on the same day. The list was due at 4:00 p.m. on Monday as indicated.

In addition to the argument that service was insufficient the employer testified that it simply did not have the time to prepare the type list that the law requires. This is a self-fulfilling prophecy. The Act and the obligations thereunder have been in effect since August 28, 1975. If an employer puts itself in a situation that makes compliance with the law impossible or highly problematical the employer must suffer the consequences of this negligence (and if not negligence then bad faith). Given the express requirement of §20310(a)(2) an employer who does not

maintain such a list, thereby insuring his or her ability to comply with the requirement of the §20310(a)(2), fails to exercise due diligence and is negligent. (Cardinal Distributing Co., 3 ALRB No. 23 (1977).)

Given the negligent conduct the question is whether the rights of workers to an informed choice has been violated by prejudice to a union's effort to inform the workers as to the merits of unionization and differences between particular unions. The employer argues that there was no prejudice since the union could obtain access to workers through the access regulation of the California Administration Code. This defense to an inaccurate, incomplete, or untimely list has been rejected by the Board in Yoder, 2 ALRB No. 4 (1976) where they held that the access rule and the list requirement stand on independent grounds. The list provided the UFW was both untimely and incomplete. A deficient list in circumstances where prejudice can be fairly implied has been held to be a basis for setting aside an election. (Valley Farms, Maple Farms and Rose J. Farms, 2 ALRB No. 42 (1976) , Maples Produce Co., 2 ALRB No. 54 (1976).) Given the extremely close vote between the UFW and the IUAW and no union in the Oxnard/Finerman unit, the lack of a timely or complete list is found to have prejudiced the UFW in its efforts to reach Finerman workers before the election.

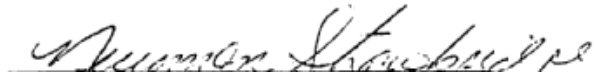
RECOMMENDATION

If the Oxnard or Finerman unit is found to be the appropriate unit, the election for that unit should be set aside

for failure to comply with the express requirement of §20310(a) (2) of
thereby depriving the workers of the unit of their rights to an informed
choice.

DATED: September 8, 1978

Respectfully submitted,

A handwritten signature in cursive script, reading "Newman Strawbridge".

NEWMAN STRAWBRIDGE
Investigative Hearing Examiner, ALRB